INDEX

Subject Index

		Page
Petition for a Writ of Certiorari		1
A.	Summary Statement of the Matter Involved	1
B.	Reasons Relied on for the Allowance of the Writ	3
C.	Prayer for Writ	4
Brief in Support of Petition for Writ of Certiorari		7
I.	The Opinion of the Court Below	7
II.	Jurisdiction	7
III.	Statement of Facts	9
IV.	Specification of Error	11
V.	Argument	11
	Summary of Argument	11
	Circumstantial Evidence was Relied upon to Prove the Essential Elements of the Crime Charged	11
	This is a Circumstantial Evidence Case	13
	The Decision of the Circuit Court of Appeals	15
	The Decision Conflicts with Decisions of the Fourth and Fifth Circuits	18
	The Decision Required the Ninth Circuit to Overrule an Earlier Decision	20
	The Decision Conflicts with the Weight of Authority	21
	The Decision Is Wrong in Principle	24
	Conclusion	24

Table of Cases

Anderson v. United States, (CCA5) 30 F. (2d) 485	4, 19
Bollenbach v. United States, 326 U.S. 607, 90 L. Ed. 350	23
Flanagan v. State, (Okla.) 124 P. (2d) 270-273	25
Gardner v. State, (Wyo.) 196 Pac. 750-775	26
Garst v. United States, (CCA4) 180 Fed. 339	4, 20
Gypsy Oil Co. v. Escoe, 275 U.S. 498, 48 S. Ct. 122, 72 L. Ed. 393	8

Page

Paddock v. United States, 79 F. (2d) 872 ..... 4, 20
People v. Hatchett, (Cal.) 146 P. (2d) 469-474 22
People v. Rayol, (Cal.) 150 P. (2d) 812-813 22
Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. Ed. 1290 8
State v. Hix, (Ida.) 78 P (2d) 1003 23
Stutz v. United States, (CCA5) 47 F. (2d) 1029 ..... 4. 18
United States v. Austin-Bagley Corp., (CCA2) 31 F. (2d) 229 18
United States v. Becker, (CCA2) 62 F. (2d) 1007 ..... 4, 18

Table of Statutes Cited.

Title 18, Section 80, United States Code 2, 11
Title 18, Section 550, United States Code 12
Title 28, Section 347, United States Code 8
Title 28, Section 1254, United States Code 8
Title 50, Section 1611, United States Code 12
Title 50, Section 1625, United States Code, War Appendix 12
Surplus Property Administration, Regulation 7, Federal Register, Vol. 10, No. 203, pp. 12849-12850 13

Textbooks and Encyclopedias Cited.

53 Am. Jur. 569 21
23 C.J.S. Section 1250 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

IRVING J. McCOY,
Petitioner.

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

The Petition of Irving J. McCoy respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

The Petitioner, Irving J. McCoy, defendant and appellant, was charged by indictment containing two counts filed in the District Court of the United States, District of Montana, on October 8, 1946, with the presentation of false statements and representations and with aiding and abetting in the presentation of false statements

and representations to the War Assets Administration, an agency of the United States, to acquire certain Army Surplus property in violation of Section 80, Title 18, United States Code (R. 2). The case was submitted to a jury upon the second count of the indictment and a verdict of guilty was returned on October 25, 1946, (R. 164) upon which a judgment of conviction was entered and the defendant sentenced to serve a term of two years (R. 167).

The petitioner had offered an instruction in the District Court on the subject of circumstantial evidence which included the statement that "where a conviction is sought upon circumstantial evidence, all the incriminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis." (R. 158). This instruction was refused and no special instruction was given by the District Court upon the subject. The refusal of the Court to give a special instruction upon the circumstantial evidence rule was assigned as error upon appeal to the Circuit Court of Appeals for the Ninth Circuit (R. 171).

The case was submitted to a panel of three judges of the Circuit Court on June 9, 1947. On August 25, 1947, the panel reported that the case should be submitted to the Court sitting en banc, and it was thereupon ordered that the submission of the case be set aside and the case returned to the Court en banc for decision upon all of the questions in the case and that further briefs be filed on the question of whether or not the trial Court's refusal to give a proffered instruction on the subject of circumstantial evidence constituted reversible error.

The case was re-argued before the Circuit Court of Appeals sitting en banc on December 19, 1947, (R. 177) and thereafter on June 28, 1948, the Circuit Court of Appeals affirmed the judgment of conviction (R. 178).

A petition for rehearing was filed on July 28, 1948. On August 24, 1948, the Circuit Court of Appeals ordered the opinion filed on June 28, 1948, withdrawn and a rewritten opinion filed in its stead. The rewritten opinion was thereupon filed, the pending petition for a rehearing was denied but appellant was granted thirty days to file a new petition for rehearing (R. 178).

A petition for rehearing, directed to the rewritten opinion, was filed on September 22, 1948, and thereafter denied on October 8, 1948. (R. 204).

The Circuit Court of Appeals held that the failure to give a specific instruction upon the circumstantial evidence rule was not error.

B.

Reasons Relied on for the Allowance of the Writ.

1. The petitioner contends that the decision of the Circuit Court of Appeals for the Ninth Circuit, conflicts with decisions of the Circuit Courts of the Fourth and Fifth Circuits upon the right of a defendant to have the jury instructed upon the subject of circumstantial evidence, that the decision is wrong in principle and that accordingly this Court should grant certiorari.

2. The Circuit Court of Appeals recognized in its opinion that the evidence must not only be consistent with guilt,

but inconsistent with every hypothesis of innocence and that the evidence should be required to point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis but that of guilt, but held that it was not necessary that the jury be so advised, citing United States vs. Becker (CCA2) 62F (2d) 1007, stating that the decision of the Ninth Circuit in Paddock vs. United States, 79 F. (2d) 872 in so far as inconsistent with the decision may be deemed overruled. The petitioner cited among other cases, a decision from the Fourth Circuit, Garst v. United States (CCA4) 180 Fed. 339, and decisions from the Fifth Circuit, Anderson v. United States (CCA5)), 30 F. (2d) 485, Stutz v. United States (CCA5), 47 F. (2d) 1029, to the effect that failure to instruct the jury upon the circumstantial evidence rule under facts which we believe comparable was reversible error. The case accordingly presents a question of law which we contend has been decided in this case in conflict with the weight of authority, with decisions of the Fourth and Fifth Circuits and which involves a principle of sufficient importance to have caused the reversal of other cases where a similar instruction was under consideration.

3. The petitioner accordingly contends that the Circuit Court of Appeals has rendered a decision in conflict with the decisions of the Circuit Court of Appeals of other Circuits on the same matter, has decided a federal question in a way in conflict with the weight of authority, and that certiorari may properly be applied for.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of

the Honorable Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 11474, Irving J. McCoy, Appellant, vs. United States of America, Appellee, and that the said judgment of the Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

IRVING J. McCOY,
Petitioner,

By WELLINGTON D. RANKIN,
Counsel for Petitioner,
Helena, Montana.

HJALMER B. LANDOE,
CHARLES L. ZIMMERMAN,
ARTHUR P. ACHER,
Of Counsel for Petitioner,
Helena, Montana.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

IRVING J. McCOY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The original Opinion in the Circuit Court of Appeals for the Ninth Circuit was rendered on June 28, 1948. This opinion was withdrawn and a rewritten opinion was filed on August 24, 1948, and is found at page 178 of the record.

II.

Jurisdiction.

(1) The date of the judgment to be reviewed is August 24, 1948, (R. 203). A petition for rehearing was filed on September 22, 1948, and was denied on October 8, 1948, (R. 204). Since the petition for a rehearing was filed within the time allowed by the rules of the Circuit Court of Appeals for the Ninth Circuit, the time for filing petition for cer-

tiorari begins to run from the date of denial of such petition for rehearing. Gypsy Oil Co. v. Escoe, 275 U. S. 498, 48 S. Ct. 122, 72 L. Ed. 393.

(2) The petitioner had offered an instruction on circumstantial evidence (R. 158) which was refused by the trial court (R. 156). The Circuit Court of Appeals held there was no error in the refusal of the proffered instruction on circumstantial evidence (R. 195).

(3) This Court has jurisdiction to review the decision of the Circuit Court of Appeals of the Ninth Circuit under the provisions of Section 240 of the Judicial Code, Section 347, Title 28 United States Code, authorizing the Court to require by certiorari any criminal case be certified to the Supreme Court for determination from the Circuit Court of Appeals upon petition of a party thereto (Section 1254, Title 28, United States Code, effective September 1, 1948).

(4) The specific claims asserted by petitioner in the lower court and in the appellate court, upon which the petitioner relies as the basis of this court's jurisdiction are that the petitioner suffered prejudicial error by the refusal of the trial court to give the proffered instruction heretofore referred to, which contention was overruled by the Circuit Court of Appeals. The petitioner further contends that the decision of the Circuit Court of Appeals is in conflict with decisions of the Fourth and Fifth Circuits, and that accordingly the jurisdiction of this Court is properly invoked. Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. Ed. 1290.

III.

Statement of Facts.

The specific charge upon which the petitioner McCoy was convicted was that he had knowingly and willfully caused to be made and aided and abetted in the making and presentation of false and fraudulent statements and representations to the United States for the purchase of two surplus army trucks, representing the trucks were to aid a veteran establish or maintain his own small business enterprise, whereas the purchase of the trucks were for use in the business of the defendant, not a veteran (R. 3).

The alleged false and fraudulent statements were contained in applications for the purchase of two army trucks Exhibit 9 (R. 90) and Exhibit 10 (R. 94) made by one Frederick Browning, a veteran (R. 79) at a surplus property sale held in Butte, Montana, for veterans of World War Two by the War Assets Administration on March 27 and 28, 1946, the first sale of its kind in the United States (R. 9). The Government contended that the petitioner McCoy, not a veteran, had induced and procured the presentation of the applications and that they contained false statements, known by the petitioner to be false.

The applications by Browning stated that the trucks were to be used in and as a part of the enterprise described as Gallatin Industries, Inc., a corporation engaged in the manufacture of building blocks (R. 90, 94). Browning was Secretary-Treasurer of the Corporation (R. 77) a more than 50 per cent veteran owned enterprise (R. 79, 123).

The Gallatin Industries had a lease upon a certain deposit of lava rock (R. 97). Browning said he desired trucks to

haul rock to the company's plant (R. 81) that he asked McCoy to finance the purchase of a truck and that McCoy agreed to do so (R. 82). McCoy looked at the trucks to see if they were satisfactory for the contemplated work (R. 83) and supplied the money for the purchase price (R. 84).

At the time the money was advanced, Browning testified that he and McCoy had an oral agreement that when the trucks had paid the purchase price from hauling they would each own a one-half interest (R. 86).

Browning, however, testified that McCoy had nothing to do with the applications made or the representations made except that he had approved the trucks as being satisfactory for the purpose desired (R. 96, 97).

The indictment charges that the trucks were to be used in the business of the defendant (R. 4).

The record shows that the defendant was in the trucking business, hauling cattle, gravel, or other property (R. 96).

There was no evidence that the trucks purchased by the veteran Browning were used in that business or were used by any one. The evidence was that the trucks were stored in McCoy's Garage (R. 86) because they were not required to haul rock for Gallatin Industries as contemplated by reason of the failure of the company to obtain the machinery needed to make building blocks (Tr. 87, 88).

It was contended in the Circuit Court of Appeals that a conviction must be sustained upon circumstantial evidence and that the petitioner suffered prejudicial error by the failure of the trial court to give a proper instruction upon cir-

cumstantial evidence, as set forth in the petition, supra, under the heading Summary Statement of the Matter Involved.

IV.

Specification of Error.

1. The Court of Appeals for the Ninth Circuit erred in holding that the District Court did not err in submitting the case to the jury without a specific instruction upon the subject of circumstantial evidence.

V.

ARGUMENT.

Summary of Argument.

A. The Court of Appeals for the Ninth Cricuit erred in its decision that an instruction upon circumstantial evidence need not be given stating the proposition that where a conviction is sought upon circumstantial evidence, all the incriminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

Circumstantial Evidence Was Relied Upon to Prove the Essential Elements of the Crime Charged.

The statutes involved.

Section 80, Title 18, United States Code so far as applicable provides:

> "Whoever shall knowingly and willfully * * * make or cause to be made any false or fraudulent statements or representations or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim certificate, affidavit, or deposition, knowing the

same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined not more than $10,000 or imprisoned not more than ten years or both."

Section 550 Title 18, United States Code provides:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Section 1611, Title 50, United States Code (Appendix Emergency and Post-War Legislation), page 605 provides in part as follows:

"The Congress hereby declares that the objectives of this Act (Sections 1611-1646 of this Appendix) are to facilitate and regulate the orderly disposal of surplus property so as * * *

(b) to give maximum aid in the reestablishment of a peacetime economy of free independent private enterprise, the development of the maximum of independent operators in trade, industry, and agriculture, and to stimulate full employment; * * *

(f) to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business, and professional enterprises;

(g) to encourage and foster post-war employment opportunities;"

The law specifically authorized the adoption of regulations to aid veterans in the acquisition of property to enable them to maintain "their own small business * * * enterprises."

Thus, Section 1625, Title 50 War, Appendix, United States Code, provides in part, as follows:

> "The administrator shall prescribe regulations to effectuate the objectives of this Act (Sections 1611-1646 of this appendix) to aid veterans in the acquisition of surplus property in appropriate quantities and types to enable them to establish and maintain their own small business, professional or agricultural enterprises * * * ."

The phrase "own business enterprise" is defined in a Regulation adopted pursuant to the above statutory authorization.

Surplus Property Administration, Regulation 7, Federal Register, Vol. 10, No. 203, pp. 12849-12850, effective October 15, 1945, provides in part:

> " 'Own' business or professional or agricultural enterprise means one of which more than fifty (50%) per cent of the invested capital or net income thereof is owned by, or accrues to, a veteran or veterans."

This Is a Circumstantial Evidence Case.

The essential elements of the crime charged are, that a false statement was made (by the Veteran Browning); that the defendant (a civilian) knew it was false; that the defendant aided and abetted in its making and in its presentation to the United States.

Petitioner contends that each of these elements, if established at all, were only shown by circumstantial evidence.

The veteran Browning testified that the trucks were to be used in the business of Gallatin Industries (R. 85). The jury to find the first element, must infer from facts in evidence that because McCoy furnished the money to buy the trucks and had possession of them they were to be used in

his business, notwithstanding the direct evidence of Browning to the contrary.

There is no direct evidence that the defendant knew what statements Browning made in the applications or that the statements were false.

The only direct evidence is of Browning, the veteran, who testified that he made the application and that McCoy had nothing to do with the representations made (R. 96). There was direct evidence that McCoy had not seen the application (R. 97). If it is inferred that the statements made were false, the jury must also infer the guilty knowledge on McCoy's part, and ignore the direct evidence of Browning to the contrary.

There is no direct evidence that McCoy aided and abetted in the making of the statements.

The direct evidence is that McCoy did not suggest the making of a false statement in the application. Browning testified:

"Q. Was there ever any suggestion by Mr. McCoy that you make a false statement in that application?

A. No.

Q. Did McCoy even see the application that you made as far as you know?

A. Not that I can remember. I don't think so." (R. 97).

To find that McCoy aided and abetted in the making of the application the jury must infer that fact from the fact that Browning rode with McCoy from Bozeman to the sale (R. 83); that McCoy inspected the trucks (R. 83) and fi-

nanced their purchase (R. 82) but the direct evidence that McCoy was to be repaid from the earnings of the truck (R. 85) and that McCoy was requested to inspect the trucks because of his knowledge of trucks (R. 81) must be ignored.

There is no direct evidence that McCoy knowingly and wilfully caused the statement to be presented to the government.

No witness testified that McCoy caused the Browning application to be presented. The direct evidence is to the contrary. Thus Browning testified:

> "Now did the defendant McCoy have anything to do with the application you made for the truck?
>
> A. Not a thing.
>
> Q. Did he have anything to do with any representation you made in that truck? In that application?
>
> A. Except he told me we could use them for our purpurpose. That they would be satisfactory." (R. 96-97).

McCoy was not present when the applications were filed, and never saw them (R. 97).

Again this essential element of the crime must be inferred from the facts and circumstances.

The Decision of the Circuit Court of Appeals.

The petitioner offered an instruction in the District Court on the subject of circumstantial evidence including the statement:

> 'You are instructed that where a conviction is sought upon circumstantial evidence, all the incriminatory

circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis." (R. 158)

This instruction was refused (R. 156) and no specific instruction given upon the subject.

The Circuit Court of Appeals stated:

> "Any rule for the special treatment of evidence upon the basis of its character, direct or circumstantial, is bound to be difficult of correct application. And too, any instruction to a jury directing a different treatment for circumstantial evidence than is to be accorded direct evidence will, if heeded at all, tend to confusion and incite in the juror's mind the too prevalent and persistent illusion that circumstantial evidence is inferior to direct evidence. The giving of any such instruction is very apt to be regarded as in some degree judicially confirming the not uncommon belief that a conviction by the aid of circumstances is highly unreliable and unconscionable. The books are full of judicial discord through attempts to distinguish between direct and circumstantial evidence in jury instructions." (R. 196)

The decision declares the rule that the rights of a defendent in a circumstantial evidence case are protected if the jury is instructed:

> "When two conclusions may be reasonably drawn from the evidence, the one of guilt and the other of innocence, the jury should reject the one of guilt and accept the one of innocence, and in that event should find the defendant not guilty. That is where two conclusions can be drawn as reasonably one way as the other, one pointing to the guilt and one to the innocence, you, of course, must indulge the presumption of innocence and draw the conclusion of innocence." (R. 199)

The decision states:

> "The instruction quoted told the jury that guilt could be found only in the case the jury found that the matters proved were consistent with guilt and that no other conclusion could reasonably be drawn from the evidence." (R. 199)

We respectfully submit that the instruction quoted by the court does not advise the jury, as the opinion declares, that guilt could only be found if no other conclusion (than guilt) could reasonably be drawn from the evidence.

We respectfully submit that the reasoning of the court as declared in the opinion is erroneous.

That the court does declare the two statements to be synonymous is also evidenced by the statement in the opinion as follows:

> "When the case has been submitted to the jury for decision under the instruction that guilt is only to be found in case the jury regards guilt as the only reasonable determination, the verdict should not be set aside by us unless as a matter of law we should find that there is no adequate support in the evidence for such determination." (R. 202)

It is our contention that the statement, "that if two conclusions can be reasonably drawn from the evidence, the one of guilt and the other of innocence, the jury should reject the one of guilt and accept the one of innocence," is not the equivalent of the statement that evidence "must not only be consisent with guilt, but inconsistent with every reasonable hypothesis of innocence," as the court declares.

THE DECISION CONFLICTS WITH DECISIONS OF THE FOURTH AND FIFTH CIRCUITS.

The decision follows decisions of the Second Circuit, cited in the opinion stating:

> "That court refuses to follow courts which have worked out technical and academic distinctions between direct and circumstantial evidence too fine for practical application and so fine as to impel misunderstanding and confusion on the part of the jurors." (R. 197)

The court cites United States v. Austin-Bagley Corp., (CCA2) 31 F (2d) 229 and United States v. Becker (CCA2) 62 F (2d) 1007. In the latter case it is recognized that the Fourth and Fifth Circuits have held otherwise. Thus in United States v. Becker, supra, it is stated:

> "The judge failed to charge the jury as to circumstantial evidence, contenting himself with an entirely neutral statement of the opposed contentions of the parties, though he had been asked to say that such evidence was enough only when it foreclosed the hypothesis of innocence. He had with ample elaboration told them that they must be satisfied beyond fair doubt of the defendant's guilt, and that in our judgment was enough, though some courts have held otherwise. Stutz v. U. S., 47 F. (2d) 1029 (C.C.A. 5); Garst v. U. S., 180 F. 339 (C.C.A. 4); Anderson v. U. S., 30 F. (2d) 485, 487 (C.C.A. 5)."

In Stutz v. United States (C.C.A. 5) 47 F (2d) 1029-1030, an instruction was requested as follows:

> " 'The court charges you that before you can convict on circumstantial evidence the circumstantial evidence must be consistent with the guilt of the defendant upon trial and inconsistent with his innocence, and the evi-

dence must be so strong, clear and conclusive as to the guilt of the defendant as to remove every other reasonable hypothesis except the defendant's guilt!"

The court said:

"This was a correct statement of law, and pertinent to the case. 16 C. J. Sec. 1568; Chass v. United States (C.C.A.) 258 F. 911. The only charge given in respect to circumstantial evidence was this: "There are cases where the testimony is positive and direct. There are other cases where the testimony is indirect, circumstantial, as we call it, but the law recognizes that circucstantial evidence is just as valuable evidence in determining a case as is direct testimony, excepting where the testimony is circumstantial you should exercise more care. You should carry along with it, of course, the legal idea that the defendant is innocent until he is proven guilty, but from circumstantial evidence you may draw just as strong a conclusion of guilt as you may draw a conclusion of innocence." *This charge is not the equivalent of that refused, nor even of the same tendency and did not cure the erroneous refusal.*" (Italics ours)

In Anderson v. United States (CCA5) 30 F (2d) 485 an instruction was requested which included the statement:

"It is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the defendant; they must exclude every other reasonable hypothesis, except that of the defendant's guilt, and, unless they do so beyond a reasonable doubt, you will find the said defendant Melvin D. Anderson not guilty.' "

The court held refusal to give the instruction prejudicial error, stating:

"It is a fundamental rule of evidence that, in order to support a conviction, circumstantial evidence must

exclude every reasonable hypothesis, other than that of guilt. Nowhere in the general charge was the offense for which appellant was indicted plainly defined for the enlightenment of the jury, nor was the jury charged regarding the rule applicable to circumstantial evidence. The requested charge above set out was enough to call the court's attention to the law applicable, and appellant had the right to either have the charge given or the jury properly instructed in the general charge. In these circumstances the refusal to give the charge was also prejudicial error."

In Garst v. United States (C.C.A. 4) 180 Fed. 339,343, the jury were instructed:

"'Yet, if the facts are equally consistent with innocence, you should acquit.'"

The court held the instruction faulty and said:

"We think the instruction as given should have gone as far as the weight of authority authorized, and should not have made it possible for the jury to infer that they were only authorized to acquit in the event that the proved essential facts and circumstances were "equally as consistent" with the innocence as with the guilt of the defendants, for the practically unbroken line of decisions is to the effect that, in order to convict on circumstantial evidence, not only must all the circumstances concur to show that the defendant committed the crime, but they must be inconsistent with any other rational or reasonable conclusion, and that the refusal to give such an instruction is error."

THE DECISION REQUIRED THE NINTH CIRCUIT TO OVERRULE AN EARLIER DECISION.

The Circuit Court of Appeals for the Ninth Circuit in Paddock v. United States (C.C.A. 9) 79 F (2d) 872, considered an instruction which included the statement:

> "Evidence about circumstances, but this is the same with all circumstances, must at all times be consistent with guilt only and inconsistent with innocence, but since you are required to believe the defendant guilty beyond a reasonable doubt, it, so far as I can see, makes little difference what form of evidence you are relying upon."

but declared the instruction erroneous, stating:

> "The additional statement in the instruction that evidence about circumstances * * * must at all times be consistent with guilt only and inconsistent with innocence," omits the qualifying and important phrase, "inconsistent with every reasonable hypothesis of innocence," and for that reason is an erroneous statement of the law."

In the decision rendered in this case the Court of Appeals stated:

> "To the extent that the expressions and ruling of this court in Paddock v. United States, 79 Fed. 2d 872, must be construed as in conflict with our rulings and expressions herein, they may be deemed to be overruled." (R. 202)

THE DECISION CONFLICTS WITH THE WEIGHT OF AUTHORITY.

In 23 C. J. S., Section 1250, Page 809 it is stated:

> 'Where the prosecution relies solely or substantially on circumstantial evidence or conviction may be had on such evidence alone, the court should instruct upon the law relating to such evidence."

The rule is supported by citations from seventeen states.

The rule is stated in 53 Am. Jur. 569 as follows:

> "When the inculpatory evidence against an accused is wholly circumstantial, it is the duty of the court, at

least on request, and in some jurisdictions irrespective of request, to give, and it would be error to refuse, an instruction which correctly states the force of such evidence required for conviction, and the principle by which it is to be weighed and considered."

THE DECISION IS WRONG IN PRINCIPLE.

In People v. Rayol (Cal.) 150 P. (2d) 812, 813, an instruction was given, as follows:

> "If the evidence in this case is susceptible of two constructions or interpretations each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt."

The Court said: (P. 813)

> "'Neither the statement in an instruction that the guilt of the defendant must be established beyond a reasonable doubt, nor the statement that as between two opposing reasonable inferences the one which is consistent with innocence must be preferred to the one tending to show guilt, satisfies the right of the defendant to have the Jury instructed that where circumstantial evidence is relied upon by the People it must be irreconcilable with the theory of innocence in order to furnish a sound basis for conviction.'"

As the court said in People v. Hatchett, (Cal.) 146 P. (2d) 469 at 474:

> "The rule under which circumstantial evidence is to be weighed is not one which would be suggested to the lay mind by instructions that doubts are to be resolved in favor of the accused. This is sufficiently proved by the fact that through long experience it has become an established practice in the courts to state the rule in distinct and specific form, to serve as an easily under-

stood and safe guide for juries in weighing the sufficiency of circumstantial evidence. Simplicity in the statement of legal principles adds greatly to their efficacy; statements of abstract principles which leave the jury in doubt as to their proper application tend toward confusion. Neither the statement in an instruction that the guilt of the defendant must be established beyond a reasonable doubt, nor the statement that as between two opposing reasonable inferences the one which is consistent with innocence must be preferred to the one tending to show guilt, satisfies the right of the defendant to have the jury instructed that where circumstantial evidence is relied upon by the People it must be irreconcilable with the theory of innocence in order to furnish a sound basis for conviction."

In Bollenbach v. United States, 326 U. S. 607, 90 L. Ed. 350, this court states that:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

In State v. Hix (Ida.) 78 P. (2d) 1003, the court held it error to fail to give a similar instruction stating:

> "Circumstantial evidence can be so certain and definite as to leave no room for reasonable doubt, and in such case an average jury will generally convict, but circumstances can sometimes be very strong against an innocent person but at the same time not exclude a reasonable theory of innocence. In such case circumstantial evidence is very dangerous, as it arouses violent suspicions which are difficult to explain or rebut even by an innocent person."

CONCLUSION

The record shows that this prosecution arose out of the first sale of surplus property of this particular type in the United States (R. 9).

We submit that the instant case is distinguishable from a criminal case involving guilty participation in a robbery, a theft, or a crime of violence. In such a case the corpus delicti, the substance of the offense, the existence of the criminal fact, is unlawful and criminal within the knowledge of any person not mentally incompetent. Hence in such a case it is easy for any person to readily understand that any knowing or wilful participation renders one equally guilty who may have aided in the crime.

Here the essence of the crime charged, whether or not a false representation was in fact made by the veteran, Browning, is a fairly debatable question at the outset particularly as Browning signed two inconsistent certificates in the same application. In one certificate it was stated:

> "That the enterprise described herein is one of which more than fifty (50) per cent of the invested capital or net income thereof is owned by, or accrues to me or other veterans." (R. 91)

In the other certificate it was stated:

> "That no person or persons other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof." (See original Exhibit 9).

There can be no question but that the note in evidence (Exhibit 11, R. 72) was highly prejudicial to the petitioner. However, it is not a confession of guilt. It does not remove the case from the circumstantial evidence rule. A confession admitting the commission of the crime charged is, of course, direct evidence. Facts stated or admitted from which an inference of participation may arise are merely circumstantial evidence, Flanagan v. State (Okla.) 124 P. (2d) 270, 273,

So, in this case, it was extremely important that the jury be adequately instructed upon the circumstantial evidence rule.

Assume that it was Browning's idea to purchase the trucks, that he intended them for use by Gallatin Industries, by whom he was employed; that the trucks were desired to haul lava rock to the company's plant to manufacture building blocks; that he asked McCoy to examine the trucks before purchase to see if they were suitable, because McCoy was a trucker and knew about trucks; that the trucks were not used by Gallatin Industries because of its inability to obtain the required machinery for the manufacture of the building blocks; that McCoy had nothing to do with the representations made by Browning in his application for permission to buy the trucks and never saw the applications. All of these facts appear from the *direct* evidence of Browning. Should McCoy serve a term of two years in the penitentiary because he advanced the money for the purchase of the trucks or because of statements made to another veteran, Lahren, about other surplus property at other

surplus property sales, or because he wrote an incoherent note to Lahren?

As the court said in Gardner v. State (Wyo.) 196 Pac. 750, 756:

> "We believe that the courts should, in such cases, instruct on the law regarding circumstantial evidence, whether requested to or not, as being fundamental to the defendant's having a fair trial, such as the Constitution and laws guarantee to him."

The circumstantial evidence rule is well recognized, as the foregoing authorities indicate.

The circumstantial evidence rule is recognized by the Court of Appeals. Thus it is stated:

> "Of course, the jury's conclusion must have support in the evidence to the effect that there is no hypothesis determinable from the proof under which the verdict of guilt could reasonably be avoided, but this is not saying that any technical form of instruction need be given." (R. 200)

> "The evidence should be required to point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis but that of guilt." (R. 200)

However the Circuit Court while recognizing the rule which the jury should follow, holds that it need not be communicated to the jury. In this we submit that the Court of Appeals erred, and that the petitioner was denied a fair trial.

It is, therefore, respectfully submitted that this case is one calling for exercise by this court of its supervisory

powers, in order that the error committed by the District Court and approved by the Circuit Court of Appeals may be corrected, and that to such an end a writ of certiorari should be granted, and this court should review the decision of the United States Court of Appeals for the Ninth Circuit and finally reverse it.

Respectfully submitted,

WELLINGTON D. RANKIN,
Counsel for Petitioner,
Helena, Montana.

HJALMER B. LANDOE,
CHARLES L. ZIMMERMAN,
ARTHUR P. ACHER,
Of Counsel for Petitioner,
Helena, Montana.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	7
Conclusion	12

CITATIONS

Cases:

Anderson v. *United States*, 30 F. 2d 485	7
Campbell v. *United States*, 47 F. 2d 70	8
Carnahan v. *United States*, 35 F. 2d 96, certiorari denied, 281 U. S. 723	9
Garst v. *United States*, 180 Fed. 339	7
Herman v. *United States*, 48 F. 2d 479	8
McMillan v. *United States*, 27 F. 2d 94	9
Portman v. *United States*, 34 F. 2d 406	9
Sloan v. *United States*, 31 F. 2d 902	8
Stutz v. *United States*, 47 F. 2d 1029	7
Sullivan v. *United States*, 32 F. 2d 992	9
United States v. *Austin-Bagley Corp.*, 31 F. 2d 229, certiorari denied, 279 U. S. 863	6
United States v. *Becker*, 62 F. 2d 1007	6, 8
United States v. *Valenti*, 134 F. 2d 362, certiorari denied, 319 U. S. 761	8

Statutes:

Surplus Property Act of 1944, as amended (60 Stat. 168; 50 U. S. C. App. 1625): Sec. 16	2
United States Code, Title 18, Section 80 (Sec. 35 (A) Criminal Code, now 18 U. S. C. 1001)	2

Miscellaneous:

Branson, *Instructions to Juries* (3rd ed. 1936), § 65	8, 9
Note, 89 A. L. R. 1379	8
Randall, *Instructions to Juries*, §§ 226–227, 233–234	8, 9, 10
Wigmore, *Evidence* (3rd ed.), §§ 25–26, 2497	8

815684—48

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 392

IRVING J. McCOY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 178–202) is reported at 169 F. 2d 776.

JURISDICTION

The judgment of the Court of Appeals was entered August 24, 1948 (R. 203), and a petition for rehearing was denied October 8, 1948 (R. 204). The petition for a writ of certiorari was filed November 2, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether petitioner was entitled to have the trial court instruct the jury specifically upon the subject of circumstantial evidence.

STATEMENT

On October 8, 1946, a two-count indictment was filed against petitioner in the District Court for the District of Montana charging that he had knowingly caused false statements to be presented to the United States Government in violation of 18 U. S. C. 80 (Sec. 35 (A) Criminal Code, now 18 U. S. C. 1001). The alleged false statements were to the effect that certain Army surplus trucks, being sold by the Government under the provisions of Sec. 16 of the Surplus Property Act of 1944, as amended (60 Stat. 168; 50 U. S. C. App. 1625), were to be purchased by a veteran for use in his own small business, whereas in truth they were to be used in the business of petitioner, who was not a veteran. (R. 2–4.) The first count was dismissed for insufficiency of the evidence, but the jury returned a verdict of guilty on the second count and petitioner was sentenced to imprisonment for two years (R. 121–124, 165–167). The judgment was affirmed by the Court of Appeals for the Ninth Circuit sitting *en banc* (R. 203).

The evidence for the Government may be summarized as follows:

Three government officials testified that a surplus property sale was held in Butte, Montana, on March 27 and 28, 1946, attendance at which was limited to veterans of World War II (R. 8–14); that the veterans were required to qualify for admission to the sale (R. 17); that one, Frederick Browning, submitted a signed application to be allowed to purchase certain surplus property, in which he certified that he was a veteran and that the surplus property applied for was "to be used in and as part of" Gallatin Industries, the major part of which enterprise was owned by veterans (R. 33, 35–36, 42–43; see also R. 90–92). Immediately above Browning's signature the application form contained a warning that it is a felony to make wilfully a false statement to a government agency in a matter within its jurisdiction (R. 91). Browning, who is a veteran (R. 39–40), purchased two trucks at the sale (R. 19–24).

Sylvester Lahren, a veteran, testified that petitioner drove him from Livingston, Montana, to several surplus sales for veterans on the Pacific Coast and in Montana (R. 48–68); that it was understood petitioner was to pay half of any purchase made by Lahren (R. 59); that petitioner suggested the purchases to be made, helped him fill out the veterans' application form, and was aware of the contents of the application form

(R. 61–63); that petitioner accompanied other veterans to the sales and remarked that the more veterans he had the more chance he had of getting equipment (R. 68–70); and that before he testified at the trial he received a note from petitioner suggesting that it would be better for him to change his story (R. 71–75; cf. R. 44–47).

Browning testfied that he is a veteran and an officer of Gallatin Industries, which is controlled by veterans (R. 77–79); that he wanted to obtain some trucks for use in connection with Gallatin Industries (R. 81, 85); that petitioner advised him what type of truck to purchase, went with him to the Butte sale, inspected the equipment, agreed to finance the purchase and gave him cashier's checks to make full payments for the two trucks he bought (R. 81–84; cf. 98); that he executed no note to petitioner but simply had an oral agreement with him before the purchase that the trucks were to be used to haul rock for Gallatin Industries, that Gallatin Industries was to pay petitioner so much per yard of rock hauled until petitioner was reimbursed, and that thereafter he and petitioner would each own a half interest in the trucks (R. 85–86); that petitioner's son took delivery of the trucks (R. 85); that both trucks were stored in petitioner's garage and that the witness had never exercised control over them or received any compensation for their use (R. 86–88); and that only one of them had been

registered in his name (R. 88). The witness admitted signing the application in which he stated that the trucks were "to be used in and as part of" Gallatin Industries (R. 88–94). There was other evidence that only one of the two trucks bought by Browning was registered in his name, and on that registration Browning's address was "in care of" petitioner (R. 111–113).

John Sexton testified that he is a veteran, that he also purchased a truck at the Butte sale, that petitioner financed the purchase, and that petitioner was to operate the truck until it had been paid for after which petitioner and the witness would each own a half interest in it (R. 99–104).

Petitioner did not take the stand and offered only one character witness in his defense (R. 124–125). It was stipulated that petitioner is not a veteran (R. 76–77).

Defense counsel requested that the following instruction be given the jury (R. 158–159):

> You are instructed that where a conviction is sought upon circumstantial evidence, all the incriminating circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis. If there is any single fact proved which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt and you should acquit the defendant.

This instruction was refused. In his general charge, however, the trial judge took rather unusual pains in explaining that the jury must be convinced beyond a reasonable doubt before it could return a verdict of guilty (R. 135, 136, 137, 139–141, 146, 147, 153, 155).

In the Court of Appeals petitioner argued, among other things, that practically all the evidence against him was circumstantial in nature and that the trial court should, therefore, have given the requested instruction on that subject. The Court of Appeals, however, held that the instruction was unnecessary. The opinion points out that there was considerable evidence of both types, direct and circumstantial, in the case. The opinion goes on to cite with approval two cases from the Second Circuit[1] which indicate that an adequate instruction that the evidence must show guilt beyond a reasonable doubt is sufficient in any case, and that a special instruction on the effect to be given circumstantial evidence is only confusing to the jury. The opinion then concludes that the trial court's charge in this case clearly instructed the jury that they could not convict petitioner unless they were convinced of his guilt beyond a reasonable doubt and unless they found that guilt was the only reasonable

[1] *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, certiorari denied, 279 U. S. 863; *United States* v. *Becker*, 62 F. 2d 1007.

conclusion to be drawn from the evidence (R. 195–202).

ARGUMENT

Petitioner contends that the elements of the charge of the indictment were established by circumstantial evidence alone (Pet. 13–15). He argues that, where the prosecution depends mainly upon circumstantial evidence, it is wrong in principle (Pet. 22–23) and contrary to the weight of authority (Pet. 21–22) to refuse to instruct the jury that, before a conviction can be had upon such evidence, it must be so strong as to exclude every other reasonable hypothesis but that of guilt. He contends that certiorari should be granted to settle the asserted conflict on this point between the present decision and the two Second Circuit cases cited above,[2] on the one hand, and several decisions from the Fourth and Fifth Circuits on the other.[3]

It is generally said that when the evidence for the prosecution is chiefly circumstantial, the defendant is entitled to a specific instruction on the nature of that evidence, over and above the usual instruction on reasonable doubt, to the effect that conviction can only be had if the evidence is inconsistent with every other reasonable

---

[2] See footnote 1, *supra*.

[3] *Stutz* v. *United States*, 47 F. 2d 1029 (C. C. A. 5); *Anderson* v. *United States*, 30 F. 2d 485 (C. C. A. 5); *Garst* v. *United States*, 180 Fed. 339 (C. C. A. 4).

hypothesis but that of guilt. Randall, *Instructions to Juries,* §§ 226, 233–234; Branson, *Instructions to Juries* (3rd ed. 1936), § 65; Note, 89 A. L. R. 1379. With this rule the decisions of the Second Circuit, quoted with approval by the court below (R. 196–198), appear to be in conflict. Thus in *United States* v. *Becker,* 62 F. 2d 1007, 1010, the Second Circuit held that where the jury have been clearly told in a circumstantial evidence case that they must be satisfied beyond a reasonable doubt of the defendant's guilt, it is only confusing to the jury to draw a distinction between circumstantial and direct evidence. See also *United States* v. *Valenti,* 134 F. 2d 362, 364–365, certiorari denied, 319 U. S. 761; and cf. Wigmore, *Evidence* (3rd ed. 1940), §§ 25–26, 2497.

But we think the point of asserted conflict is not reached in this case for, as the court below pointed out (R. 196), the Government did not rely wholly or mainly upon circumstantial evidence to establish the fact that a false statement had been presented by Browning, aided and abetted by petitioner. And it is undisputed that it is not error to refuse to instruct the jury on circumstantial evidence where the proof is, at least in part, direct. *Campbell* v. *United States,* 47 F. 2d 70, 71 (C. C. A. 5); *Herman* v. *United States,* 48 F. 2d 479, 480 (C. C. A. 5); *Sloan* v. *United States,* 31 F. 2d 902, 906 (C. C. A. 8);

Portman v. *United States*, 34 F. 2d 406, 408 (C. C. A. 8); *Carnahan* v. *United States*, 35 F. 2d 96, 104 (C. C. A. 8), certiorari denied, 281 U. S. 723; *Sullivan* v. *United States*, 32 F. 2d 992, 994 (C. C. A. 9); *McMillan* v. *United States*, 27 F. 2d 94, 96 (C. C. A. 8); Randall, *Instructions to Juries*, §§ 226–227; Branson, *Instructions to Juries*, § 65.

The evidence establishing presentation of the false statement by Browning and aiding and abetting by petitioner was largely direct; the circumstantial evidence was either confirmatory of this or offered in proof of petitioner's intent. Thus, there was direct evidence that Browning submitted a statement to the effect that the trucks he sought to purchase were to be used "as a part of" Gallatin Industries (R. 33, 35, 42, 83, 88–91). Browning himself admitted that the trucks were not to be Gallatin Industries' property, but were to belong equally to petitioner and himself, while Gallatin Industries was to pay for their use (R. 85–86). There was also direct evidence that petitioner drove Browning to the sale (R. 68–69, 83); that petitioner advised Browning what type of truck to apply for, inspected the trucks with him, and approved the selection (R. 81, 83, 97); and that petitioner agreed prior to the sale to finance Browning's purchase and gave him two cashier's checks in full payment

for the trucks after they had been purchased (R. 82, 84–85). Certainly this direct evidence clearly established that petitioner had aided and abetted the presentation of Browning's statement. This evidence, as well as the evidence concerning petitioner's transactions with other veterans and his custody and control of the trucks in question, was, it is true, circumstantial in proving his knowledge of the falsity of Browning's statement; but it is also true that, absent a direct admission, intent, knowledge or purpose can only be proved by such evidence. And where, as here, the corpus delicti is established by direct evidence, the fact that the proof of intent is circumstantial does not entitle the defendant to the special instruction. Randall, *Instructions to Juries,* § 227.

We think, then, that this is not a case in which petitioner was entitled to a specific instruction on the effect of circumstantial evidence, and that the trial court was correct in refusing the requested instruction. The trial court took exceptional pains, as we have already pointed out (*supra,* p. 6), to impress upon the jury that they could not convict petitioner so long as they had any reasonable doubt of his guilt. Petitioner points to one sentence in the lengthy (R. 126–156) charge which, when taken out of context, might seem to have warranted the jury in convicting merely because the inference of guilt seemed more

probable than the inference of innocence (Pet. 15–17; R. 137). But the jury had just been told that they should acquit if the inference of innocence was a reasonable one (R. 137). And they were carefully and repeatedly told that they could not convict merely because the inference of guilt seemed more probable. Thus the Court said (R. 140):

> * * * you of course cannot convict the defendant on conjectures however shrewd, on suspicions, however justified, on probabilities, however strong, but only upon evidence which establishes his guilt beyond a reasonable doubt; that is, upon proof such as logically compels the conviction that the charge is true, because suspicions are not evidence, neither are conjectures, probabilities or possibilities. It must be evidence. That is what the law says and that is what it must be, and suspicions and conjectures and probabilities are not in any sense of the word evidence.

Whatever may be said of the validity of the Second Circuit's view that a specific instruction is unnecessary in a case developed by purely circumstantial evidence, that issue is not presented by the facts of this case. Petitioner had the benefit of a very fair and painstaking charge and was not entitled, in addition, to the special instruction he requested.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.

ROBERT S. ERDAHL,
JOSEPH M. HOWARD,
Attorneys.

DECEMBER 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948